

Members

Sen. Joseph Zakas, Chairperson  
Sen. Connie Lawson  
Sen. Rose Antich  
Rep. John Aguilera  
Rep. Robert Kuzman  
Rep. Ralph Foley  
James Martin  
Vincent Heiny  
Terry Harris  
Janet Ellis  
Robert Christopher  
Cynthia Boll  
Diane Bender  
MaryEllen Kiley Bishop  
John Chappell



## PROBATE CODE STUDY COMMISSION

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Authority: IC 2-5-16-2

### MEETING MINUTES<sup>1</sup>

Meeting Date: October 23, 2001  
Meeting Time: 10:00 A.M.  
Meeting Place: State House, 200 W. Washington St., Room 130  
Meeting City: Indianapolis, Indiana  
Meeting Number: 3

**Members Present:** Sen. Joseph Zakas, Chairperson; Sen. Rose Antich; Rep. John Aguilera; Rep. Ralph Foley; James Martin; Vincent Heiny; Janet Ellis; Robert Christopher; Diane Bender; MaryEllen Kiley Bishop.

**Members Absent:** Sen. Connie Lawson; Rep. Robert Kuzman; Terry Harris; Cynthia Boll; John Chappell.

Sen. Zakas convened the meeting at 10:10 A.M. The Commission first discussed the Preliminary Drafts (PDs) that were not discussed at the last meeting of the Commission on October 10, 2001( The preliminary drafts referenced in these minutes are available at the Legislative Information Center. See footnote 1.):

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<sup>1</sup> Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.ai.org/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

### **PD 3215: Rule against perpetuities and perpetual trusts**

Mr. Jeff Kolb, representing the Indiana State Bar Association, explained that the rule against perpetuities prevents "dynasty trusts" or "perpetual trusts" which are permitted in ten other states. The Commission amended the draft to reflect the original language approved by the Probate Section of the Indiana State Bar Association. The Commission voted unanimously to recommend the draft as amended to the General Assembly.

### **PD 3219: Power of attorney modifications**

Mr. Kolb explained that PD 3219 was requested by title companies who have interpreted IC 30-5-5-9(a)(2) to mean that gifts are limited to \$10,000. The language in the draft clarifies the idea that the provisions in the power of attorney statute may be amended. The Commission amended the draft to remove unnecessary language. The Commission voted unanimously to recommend the draft as amended to the General Assembly.

### **PD 3221: Power of attorney accounting and records**

Mr. Kolb explained that PD 3221 requires the attorney in fact to retain records for six years to be consistent with the period of time the Internal Revenue Service examines in an audit for fraud. The Commission amended the draft to remove unnecessary language. The Commission voted unanimously to recommend the draft as amended to the General Assembly.

### **PD 3231: Notice of appraisal**

The Commission discussed whether the preliminary draft should state where the request for notice must be filed. Mr. William Fatout, Commissioner of the Probate Division of the Marion County Superior Court, representing the Probate Committee of the Indiana Judicial Conference, approved amending the draft to require the request for notice to be filed with the county assessor, because the probate court's county assessor file is the most complete of the court files. The Commission voted to amend the draft to specify the request is to be filed with the county assessor. The Commission also voted to amend the draft so that a person who requests notice under IC 6-4.1-5-3 does not have to file subsequent requests to receive notice under IC 6-4.1-5-9 and IC 6-4.1-5-11. The Commission voted unanimously to recommend the draft as amended to the General Assembly.

### **PD 3212: Removal of corporate trustee by beneficiary**

The Commission voted 9-1 to recommend the PD 3212 to the General Assembly.

### **Subsequent childless spouse**

Mr. Jim Martin distributed language he drafted to address the issue of the elective and intestate share of the subsequent childless spouse under IC 29-1-2-1 and IC 29-1-3-1. (A copy of the handout is available at the Legislative Information Center. See footnote 1.) Mr. Martin explained the problems in managing the one-third life estate of the subsequent childless spouse if the residence is not sold. He stated that the Probate and Real Property Section of the Indiana State Bar Association have already approved the language changing the one-third life estate to a one-fourth tenancy in common in all property. He explained that a tenant in common can partition the estate while a person with a life estate cannot. Rep. Foley stated that he wants a definition of "share" because the life estate language is archaic. He believes that a person should be able to compel division of the

property. He approves of the tenancy in common language and the language giving the subsequent spouse a one-fourth interest in all property.

Ms. Diane Bender stated that she would prefer to keep the law the way it is now. She stated that her primary concern is protecting family farms. She described the situation of a farmer with a second spouse and children from the first marriage who are involved in the farming operations. She explained that if the farmer doesn't convert the real estate to personal property, the result could be that the subsequent spouse could partition one-fourth of the family farm. She approves of the life estate language in the current law because it means the subsequent spouse has an income stream.

Rep. Foley stated that the law puts the subsequent spouse in a lesser position if the estate consists of real estate rather than stocks, bonds and cash. He objects to having another person in control of the subsequent spouse's income stream. He stated that a solution is necessary that allows for a separation of the estate. Ms. Janet Ellis stated that the word "residence" in the draft needs to be defined. Ms. MaryEllen Kiley Bishop indicated that she objects to the current law on the grounds that the subsequent spouse has no incentive to make improvements to the residence because the improvements will go to the remaindermen.

Sen. Zakas indicated that he believes the Commission would consider this issue in the future. The Commission returned to discussion of the Preliminary Drafts (PDs).

#### **PD 3429: Construction of trust**

At the October 10 meeting of the Commission, the Commission discussed PD 3210 and adopted amendments to that draft. PD 3429 is the new PD that incorporates all of the suggested amendments. The Commission voted unanimously to recommend the PD to the General Assembly.

#### **PD 3430: Liability of nonprobate transferees**

At the October 10 meeting of the Commission, the Commission discussed PD 3218 and adopted amendments to the draft. PD 3430 is the new PD that incorporates all of the suggested amendments. Counsel for the Commission discussed points of the draft and the Commission adopted additional amendments to the draft. The Commission voted unanimously to recommend the PD as amended to the General Assembly.

#### **PD 3489: Production of will in court**

At the October 10 meeting of the Commission, the Commission adopted PD 3214 with amendments that were not reduced to writing. PD 3489 contains the amendment language of the Commission. The Commission reviewed the draft and indicated that the language reflects the Commission's intent.

Mr. William Fatout expressed the belief that the subject of the preliminary draft represents a law office management problem and not a problem to be addressed in statute. He stated that if an attorney does not want to retain the original will in the attorney's office due to potential liability, the proper solution is for the attorney to notify the client of that fact. He stated that all trust corporations currently surrender the will to the probate court and indicated that the Marion County Probate Court keeps the wills and indexes them to inform those who call to find out whether a will has been filed.

#### **PD 3213: Establishing paternity for inheritance purposes**

Sen. Zakas noted that PD 3213 concerning establishing paternity for inheritance purposes was adopted by the Commission at the October 10 Commission meeting.

### **Penalties for refusing to accept the authority of an attorney in fact (IC 30-5-9-9)**

Ms. Kerry Spradlin, Indiana Bankers Association, discussed the damages and fees provisions that were added to IC 30-5-9-9 last year in SEA 190. She stated that the treble damages provision is most troubling and could lead to abuse. She stated that the award of attorney's fees under IC 30-5-9-9 would be a sufficient measure to compel banks and other institutions to accept a power of attorney. In addition, IC 30-5-9-9 is deficient because it does not specify what constitutes refusal of a power of attorney. Ms. Spradlin testified that a timeline needs to be added to the law indicating the adequate time for refusal of a power of attorney. She added that a defendant should also be able to recoup attorney's fees from a plaintiff. Ms. Spradlin indicated that she would submit her written comments to the Commission. (The comments are available at the Legislative Information Center. See footnote 1.)

Mr. James Martin stated that he agrees with Ms. Spradlin's suggestion of a timeline, as long as it does not have the result of slowing the procedure down. Mr. Vince Heiny stated that he can see how the treble damages provision could lead to excessive damage awards. He gave the example of an attorney in fact who is unable to sell 1000 shares because the power of attorney is not accepted, and on the following day the value of the shares drop.

### **The final report of the Probate Code Study Commission**

The Commission voted unanimously to make a recommendation in the final report that includes the following points:

- < The Commission adopts the Uniform Principal and Income Act (UPIA) and the Uniform Trust Code (UTC) in principle.
- < The Commission is willing to consider the UPIA and the UTC during the next interim after interested parties have had an opportunity to review them.

The Commission voted unanimously to continue to review the issue of the subsequent childless spouse during the next interim.

The Commission voted unanimously to adopt the final report, giving counsel leave to amend the report as necessary. The meeting adjourned at 12:50 P.M.